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No. .....

In The

Supreme Court of the United States

October Term, 1984

CLEM PERRIN MARINE TOWING, INC.

Petitioner,

vs.

PANAMA CANAL COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

The Circuit Court should have applied admiralty law instead of the Uniform Commercial Code to a maritime bareboat charter party.

The Circuit Court committed error in holding that factual findings of the District Court were "clearly erroneous" as the Circuit Court did not review the entire record as is required by *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), and relied upon representations in the Panama Canal Company's brief based upon facts not admitted into evidence by the District Court.

The Circuit Court misapplied the U.C.C. to the facts as found by the district court. The Circuit Court did not review the entire record in holding the District Court clearly erroneous and reversed a factual finding without stating that the District Court was clearly erroneous.

LIST OF INTERESTED PARTIES

The undersigned counsel of record for Clem Perrin Marine Towing, Inc. certifies that the following listed parties and organizations have an interest in this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Clem Perrin Marine Towing, Inc.
2. Joseph M. Nielson, duly appointed an acting trustee in bankruptcy proceedings of Clem Perrin Marine Towing, Inc.
3. Panama Canal Commission
4. United States of America

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PETITION FOR WRIT OF CERTIORARI

Clem Perrin Marine Towing, Inc., petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 5, 1984.

I.

OPINIONS OF THE COURTS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix A. The District Court's Findings of Fact and Conclusions of Law were dictated into the record in open court on July 16, 1982. (Appendix B). The judgment of the District Court was entered on October 5, 1982. (Appendix C). The Court of Appeals order denying Petitioner's Petition for Rehearing and Hearing En Banc was issued without opinion on April 5, 1984. (Appendix D).

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II.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to grant the petition under 28 U.S.C. Section 1254(1). Petitioners were granted an extension of time within which to petition for a writ of certiorari up to and including October 4, 1984, by the Honorable Justice Byron R. White pursuant to orders dated July 30, 1984, and September 12, 1984, respectively.

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III.

THE QUESTIONS PRESENTED

The Circuit Court erroneously applied the Uniform Commercial Code to a bareboat charter party between Clem Perrin Marine Towing, Inc., (vessel owner) and the

Panama Canal Company (charterer) instead of well established rules of admiralty law.

The Circuit Court also committed error in holding that factual findings of the District Court were "clearly erroneous" as the Circuit Court did not review the entire record as is required by *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), and relied upon representations in the Panama Canal Company's brief based upon facts not admitted into evidence by the District Court.

Further, after holding that U.C.C. Section 2-609 applied, the Circuit Court misapplied the U.C.C. to the facts as found by the District Court.

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IV.

STATEMENT OF THE CASE

Clem Perrin Marine Towing, Inc., a bankrupt corporation, (hereinafter referred to as "Perrin") owner of the M/V CLEM PERRIN, filed suit against the Panama Canal Company (hereinafter referred to as "Canal Company"), a corporate agency and instrumentality of the United States and charterer of the M/V CLEM PERRIN, for failure to pay charter hire. The District Court held for the plaintiff. The Fifth Circuit Court of Appeals reversed.

In the early fall of 1973, a local boat broker, Alex Judice, who had done business with the Canal Company since 1958, made a regular stop at their office in New

Orleans. There he learned that they were interested in leasing a tug for their Dredging Division. In the course of these conversations the Canal Company expressed an interest in a pointed or model bow tug. However, Mr. Judice convinced them that a square bow or push type towboat would be more appropriate for pushing the dredges and barges. Additionally, these discussions indicated that a push towboat would be less susceptible to being pulled away by the Navigation Division for ship handling duties.

Mr. Judice began searching for such a towboat, preferably at a low lease price to be attractive to the Canal Company. He inquired first at Avondale Shipyards because they were familiar with the local boat business. They referred him to Herb Lopez of George Engine Company who suggested that the M/V CLEM PERRIN might be a suitable vessel. Ultimately, that vessel was obtained at approximately 25% below market.

Mr. Judice continued to make arrangements with the Canal Company. Meanwhile, the Board of Perrin got permission to lease the boat but not to sell it. In turn, Mr. Lopez got permission from the mortgage holders to charter the vessel and for it to leave the United States. He did not get permission to sell the vessel.

The Engineering and Dredging Division of the Canal Company felt that it would take "at least two years before they could prove out this vessel" and, accordingly, wanted an option to cancel at the end of each year. Mr. Judice asked for and received a similar proviso on behalf of Perrin. Similarly, when the Canal Company asked for an option to purchase, Mr. Judice asked for that to include a proviso allowing the owner a reciprocal right not to sell.

The Canal Company Procurement Office was unable to locate a charter party form notwithstanding the fact that such a form is published in the Code of Federal Regulations. Mr. Capitelli, head of the Procurement Office asked Mr. Lopez of George Engine Company with whom the Canal Company had been doing business for some years, if he could provide a form charter party. The form was provided directly from Mr. Lopez to the Procurement Office of the Canal Company. The vessel was inspected by the Canal Company and found to be suitable.

A meeting was set up for March 15, 1974 for the Canal Company to conclude the lease. Attending were Mr. Lopez, Mr. Judice, Mr. and Mrs. Clem Perrin and Mr. Capitelli. The standard form was taken by Mr. Capitelli into an interior office where changes were made during and after a two hour conversation between the secretaries and the Canal Company's legal office in Panama. The Perrins, Mr. Lopez and Mr. Judice made no changes. The Canal Company made all the changes. The amended charter party was signed by Mrs. Perrin, President of the company, without a further reading of the document. The amended document was not read by Mr. Perrin, Mr. Judice or Mr. Lopez.

The charter party contained standard clauses pertaining to the payment of charter hire which read in part as follows:

"Art. III

Payment of Charter Hire shall not be foregone or suspended by reason of the happening of any event whatsoever except a total loss of the Vessel, actual or constructive, as constructive total loss will be defined in the policies of insurance." (emphasis added).

"Art. X

In the event that:

a) Charterer shall default in the *prompt payment of any Charter hire,* . . . .

then in any such event Owner, at his option, *may declare this Charter Party terminated* and of no further force and effect, and the total amount of charter hire will become due and payable." (emphasis added).

Article XVIII was added by the Canal Company giving each party a right of termination. The Canal Company, in Article XIX, changed an option to purchase to make it available only at the end of the charter party and also added in that article an option to renew the charter party presumably at the same rate of hire.

The M/V CLEM PERRIN and its documents were delivered to the Canal Company. There were two mortgages on the M/V CLEM PERRIN; one for $203,000.00 and one for $154,703.40.

In violation of the charter party, the Canal Company changed the name of the vessel, cut its fuel capacity in half, modified the internal framing of the vessel and added four manholes.

Thereafter, George Engine Company was named as an additional payee on all but one of the checks from the Canal Company for charter hire. It was distributing the money to the various creditors of Perrin.

In mid-summer of 1976 Mr. Lopez telephoned Mr. Capitelli to inform him that George Engine Company was making the payments on the first mortgage and Perrin was not paying it. Further questioning of Mr. Lopez would have revealed that a special arrangement had been made whereby George Engine Company was advancing

payments to the mortgage holders, that George Engine Company and the mortgage holders were relying on the personal credit of the stockholders of Perrin and that Perrin always paid its debts.

The Canal Company erroneously assumed that Perrin was in default on the mortgage. They then waited over a month and by letter of August 27, 1976 demanded from Perrin assurances that Perrin could deliver clear title by September 15, 1976, for an option to purchase which under the agreement could not be exercised until December 15, 1976. They gave Perrin twelve (12) working days to respond and sent copies of the letter to all major creditors of Perrin, including:

Alex P. Judice

George Engine Co.

Bank of New Orleans & Trust Co.

Board of Commissioners of the Port of New Orleans

American Marine and Equipment Co., Inc.

General Electric Credit Corp.

This demand was made before the Canal Company made any sort of decision as to whether or not it would exercise the option to purchase the vessel. Funds for the purchase of the vessel were not included in the Canal Company's 1976 budget and no evidence was introduced by the Canal Company that it had decided to purchase the vessel.

Mrs. Perrin did not know what could be done. Mr. Perrin thought that he had to pay off all of his mortgages by the September 15, 1976 deadline. Mr. Judice took the trouble to call the other creditors who assured him that

Perrin was not in default. He then called Mr. Capitelli and informed Mr. Capitelli that Perrin was not in default and Mr. Capitelli had received "some bum information".

The Canal Company carried out its threat and on September 15, 1976 withheld charter hire. During a discussion five days later with counsel for Perrin, the attorney for the Canal Company said, "You may have the . . . law but we have the boat."

REASONS FOR GRANTING THE WRIT

I.

Admiralty Law And Not The UCC Should Be Applied To A Maritime Charter Party

The District Judge stated:

> "I conclude that although the charter agreement contained an option to purchase clause, the contract as a whole cannot be fairly characterized as a contract of sale or a lease purchase agreement."[1]

This conclusion was based partially on testimony that permission was obtained from the mortgage holders for a charter party and not a sale. The testimony at trial showed that:

1) The Canal Company needed two years to prove out the vessel;

2) The Canal Company had not budgeted for the purchase of a tugboat; and

3) Perrin did not intend to sell the vessel.

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[1]Tr. July 16, 1982, p. 36.

The charter party provided that either party could terminate the charter at the end of the first two years. In concluding that the contract was not a sale, the trial judge relied on the credibility of various witnesses including Mr. and Mrs. Perrin, Esther Adams, Connie Brown, Herb Lopez and Alex Judice. The trial judge further stated that, "the defendant failed to prove any fraud on the part of the plaintiff in the making of the contract."[2]

Moreover, the Canal Company introduced no evidence that it intended to purchase the vessel, that it had budgeted for the sale, or that it ever bought anything on an installment basis.

Vessels have been chartered for centuries. The Latin phrase "carta partita" meaning "divided document" is the source of the modern day term "charter party."[3]

The jurisdiction of the federal courts over admiralty matters is derived from Article III, Section 2, Clause 2 of the United States Constitution.

> " . . . The jurisdiction of the admiralty over cases of hiring of vessels, and carriage in vessels of persons and property, is too well settled to be questioned . . . " *Benedict, American Admiralty,* 3rd Ed. 1894

Some 120 years ago this Court thought it had again put to rest admiralty jurisdiction over charter parties:

> "The case of *The New Jersey Steamboat Company v. the Merchants' Bank of Boston,* 6 How. 344, was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated, both by counsel and the court. Everything connected with

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[2]*Ibid.*

[3]Paunsnitz, *The Standardization of Commercial Contracts in English and Continental Law* 13-14, n. 2 (1937) (pre-1656 form of voyage charter).

the history of courts of admiralty, from the reign of Richard II to the present day—every thing which the industry, learning and research of most able counsel could discover, was brought to our notice. We then decided that charter parties and contracts of affreightment are 'maritime contract' within the true meaning and construction of the Constitution and act of Congress and cognizable in courts of admiralty by process either in rem or in personam."

". . . the question now (it is hoped for the last time) [is] mooted before us". *Moorewood v. Enequist*, 64 U.S. (23 How.) 491, 493, 494 (1860).

Gilmore and Black state that duties of a bareboat charterer are as follows:

". . . The charterer's obligations are to redeliver the vessel in as good condition, ordinary wear and tear excepted, as that in which he received her, and *to pay hire*. . . ." Gilmore and Black *The Law of Admiralty*, 2d Ed. 1975 at p. 241 (emphasis added). (Hereinafter cited as "Gilmore and Black").

In discussing the United States' participation in charter parties, Gilmore & Black state:

"At various times, the United States has appeared in each of the capacities possible under charter parties. During World War II, ships were frequently requisitioned by the government on demise charter, rather than by taking title to the vessel. The Government has time chartered vessels, too, leaving the owner in control of navigation and management. On the other hand, the government, when it has had on its hands a surplus of vessels and when sale of these has proved impossible (as to some extent after World War II) has demise—chartered them to private operators." Gilmore & Black, *supra* at 981.

"The pattern of all these governmental interventions into the shipping world in its commercial ambient is a sample one: The United States merely assumes

> one of the roles or capacities already familiar—owner, demise charterer, shipper, underwriter, employer, etc., etc. The underlying pattern of maritime law and industrial practice is little changed; the government just takes a place within the pattern." Gilmore & Black, *supra* at 982.

Rights and obligations under a charter party are governed today (as they have always been) by general maritime law. The government is bound by the same terms and conditions as any individual who contracts for the use of a vessel.

> "Ordinarily, the hiring of a private vessel by the government, whatever the manner in which the vessel is obtained, is subject to the same rules, as to the existence or termination of a charter, the terms thereof, and their construction and effect as are charters between private persons." 90 C.J.S. Section 53 at p. 752.

Similarly, General Maritime Law has been applied in government charter party cases, to the:

1. payment of freight;
2. General Average contributions by government cargo;
3. the duty to load cargo;
4. negligence in discharging cargo; and
5. the application of the COGSA one-year statute of limitations to government claims for damage to cargo.[4]

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[4]*United States v. Waterman S.S. Corp.*, 397 F.2d 577, 578 (5 Cir., 1968); *Lykes Bros. S.S. Co. v. United States*, 124 F.Supp. 622, 1954 A.M.C. 2192 (Ct. Cl. 1954), cert. denied 348 U.S. 971 (1955); *United States v. The South Star*, 115 F.Supp. 102, 1953 A.M.C. 1304 (S.D.N.Y. 1953), aff'd 210 F.2d 44, 1954 A.M.C. 418 (2d Cir., 1954); *Standard Oil Co. v. United States*, 59 F.Supp. 100, 1945 A.M.C. 310 (S.D. Cal. 1945), aff'd 156 F.2d 312, 1946 A.M.C. 1160 (9 Cir., 1946).

In *U.S. v. Shea*, 152 U.S. 178 (1894), this Court dealt with the government as a demise charterer of a steamer. In that case the government attempted to deduct charter hire for some sixty-one (61) days as a result of the vessel being laid up for repairs resulting from a collision. The opinion reviews American and English authorities stating:

> ". . . the government during this possession of the vessel, was a special owner and bound to pay rent for the vessel until returned to petitioner." 152 U.S. at 191.

More recently, this Court in *U.S. v. Cornell S.S. Co.*, 267 U.S. 281 (1925) held that the government was not entitled to make deductions from charter hire for losses caused by delays. The Fifth Circuit[5] has held that charter parties with options to purchase fall within the admiralty jurisdiction.

Bareboat charter parties have been used extensively for some time. There are default clauses in both government and other standardized forms which are similar to the clauses at issue herein.[6] (Appendix E).

More particularly, the Uniform Bareboat Charter of Government owned dry-cargo vessels under section 705

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[5]See, e.g., *Jack Neilson, Inc. v. Tug PEGGY, et al.*, 428 F.2d 54, 61 (5th Cir., 1970) (Wisdom J). See also, *Flota Maritima Browning de Cuba Sodiadad Anonina v. Snobl*, 363 F.2d 733, 736 (4th Cir., 1966).

[6]46 C.F.R., Section 299.82, Clauses 12, 24, 25 (1953); 46 C.F.R., Section 299.82, Clauses 12, 24, 25 (1957); 46 C.F.R., Section 221.13, Clauses 1, 39, 40 (1974); G. Stretch, *Chartering of Ships*, Vol. I, p. 57; Gilmore & Black, p. 1003, 1005, Appendix B, (Time Charter, Government Form, approved by the New York Produce Exchange, as amended); Parks, *The Law of Tug, Tow & Pilotage*, 2d Ed., (1982) pp. 1171, 1172, 1188; Parks *The Law of Tug, Tow & Pilotage*, (1971) p. 558, 574; Wilford, Coughlin and Healy, *Time Charters*, (1978) p. 110 (The New York Product Exchange Time Charter, 1946).

of the Merchant Marine Act, 1937, as amended, "Form No. 705" 46 C.F.R. Section 221.13 (1974) (1981) and the Uniform bareboat charter of a war-built dry-cargo vessel under the Merchant Ship Sales Act of 1946, "Ship-sales demise 303" 46 C.F.R. 299.82 (1957) have identical default provisions as follows:

> "The following shall constitute events of default under this Agreement:
>
> (a) The failure of the Charterer to pay the charter hire on each Vessel as and when the same shall be due under the terms of this Agreement. . ."
>
> • • •
>
> "Termination upon default. (a) The Owner may terminate this Agreement in whole or in part without notice to the Charterer in case any event of default specified in paragraphs (a), (b), (c), (d), (e) or (f) of the preceding Clause. . ."

One commentator has stated:

> "While the obligation to pay hire for the agreed term is almost invariably an express provision of the charter party, the demise charterer has an implied obligation to pay hire until he has redelivered the vessel at the end of the stipulated term. In the absence of specific contractual exceptions or frustration of the charter party, the charterer's duty to pay hire is unaffected by such extrinsic considerations as the unprofitability of the vessel . . ."
>
> • • •
>
> "A demise charter party generally enumerates the specific acts which will constitute a default by the charterer, such as the failure to pay charter hire or the bankruptcy of the charterer. The Default clause frequently authorized the shipowner to repossess the demised vessel without prior demand or legal process and without prejudice to any additional remedies

> which the owner may have. A tender of charter hire in arrears generally does not preclude the owner from exercising the default provisions. The payment of overdue hire following the owner's exercise of a default remedy will not entitle the charterer to resume performance of the charter in the absence of a contrary stipulation in the agreement." Gebb, *The Demise Charter A Conceptual and Practical Analysis*, 49 Tul. L. Rev. 764, 771, 783-784 (1975).

In *Luchenbach v. Pierson*, 229 F. 130 (2 Cir., 1915), a time charterer failed to pay hire on the day specified. The vessel owner gave notice that he would withdraw the vessel for non-payment of charter hire pursuant to a clause which read:

> "(6) Payment of the said hire to be made in cash, semi-monthly, in advance, or as agreed, and *in default of such payment* the owner shall have the faculty of withdrawing the said steamer from the service of the charterers . . ." (emphasis added).

Despite a subsequent tender of charter hire, the Court held that, as long as the tender was refused, the owner had the right to withdraw the vessel.

> "The charterer could not deprive him of his right to do so by any tender of the hire in arrears, nor can the Court alter the contract made by the parties." F. at 132.

See also, *Switzerland v. Compania de Vapores Arauco Panamena, S.A.*, 40 F. Supp. 330, 1941 AMC 942 (E.D. N.Y., 1941); *The U.S. 291*, 21 F.Supp. 466, 1938 AMC 318 (E.D. Pa., 1937); *Ariate Compania Nav., S.A. v. Commonwealth of Tankship O.*, 310 F. Supp. 416 (S.D. N.Y., 1970); *Ocean Cargo Lines, Ltd. v. North Atlantic Marine Co.*, 227 F.Supp. 872 (1964).

The term "default" has also been construed in many cases when the time charterer fails to timely off-load goods

due to his "default". *Washington Marine Co. v. Ranier Mill and Lumber Co.*, 198 F. 142, 144 (D.C. Ore., 1912) (the term "default" employed in that relation in charter parties signifies the failure on the part of the charterers to do or perform some duty or act which they have stipulated to or are bound in pursuance of their contractual relations to do or perform); *The Nicose*, 291 F. 412, 414 (D.C. Md., 1932) (. . . default . . . means merely the failure to comply with the agreement to complete loading in specified time); *The Olaf*, 248 F. 807 (E.D. Pa., 1918) (the word "default" when used in charter party contracts does not convey the idea of "fault" but the idea of mere failure to perform; and the lack of performance, if there is such a lack exists without regard to how it came about, subject, of course, to the vis major doctrine). See also, *The Hans Maersk*, 266 F. 806, 809 (2 Cir., 1920); *1600 Tons of Nitrate Soda v. McLeod*, 61 F. 849 (9 Cir., 1894); *Continental Grain Co. v. Armour Fertilizer Works*, 22 F.Supp. 49, 54 S.D. N.Y., 1938); *P. Dougherty Co. v. 2471 Tons of Coal ex-Barge ANNAPOLIS*, 278 F. 799 (D.C. Mass., 1922); *Southern Transp. Co. v. Unkel*, 236 F. 799, 782 (E.D. Pa., 1916).

The District Court correctly held that Article X of the charter party was clear and allowed the owner to cancel the charter party. The Circuit Court, on the other hand, held that the interpretation of the word "default" was a question of law. This effectively ignored centuries of maritime charter party practice which has been joined in by the government and, more recently by maritime financing institutions.

Charter parties have been used for the past fifteen years for leveraged financing in which a bank or other lending institution owns the vessel and secures tax ad-

vantages while the charterer pays less charter hire. See, Kalaidjean, *Government Chartering and the Charter in Modern Finance*, 49 Tul. L. Rev. 1021, 1029-1034 (1974).

Accordingly, it is urged that maritime law should apply or that, ultimately, the clauses in the agreement in question should be given the same interpretation that have been given to similar provisions over the centuries. The alternative is a breakdown in maritime transactions involving the chartering of ships, including those of the government, as well as a breakdown of recent developments in ship financing.

II.

The District Court Was Not Clearly Erroneous In Its Finding That The Panama Canal Company Had Drafted The Charter Party And That The Panama Canal Company Did Not Exercise "Due Diligence" When It Suspended The Payment Of Charter Hire.

Rule 52(a) of the Federal Rules of Civil Procedure states in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses."

In *U.S. v. United States Gypsum Co.*, this Court stated that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." (emphasis added).[7]

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[7] *U.S. vs. United States Gypsum Co.*, 333 U.S. 346, 359 (1948).

Commenting on the scope of appellate review under FRCP 52(a), Wright & Miller state:

> "Thus the findings are presumptively correct. The burden is on the appellant to persuade the reviewing court that a finding was 'clearly erroneous'. In the colorful phrase of one court, the findings 'come here well armed with the buckler and shield' of Rule 52(a)".[8]
>
> "It (the appellate court) must give great weight to the findings made and the inferences drawn by the trial judge."[9]

The holding of this Court in *U.S. v. United States Gypsum Co.*, (supra) requires that the appellate court examine the entire record prior to holding that a finding of the lower court is "clearly erroneous". We respectfully submit that this was not done in this case. Portions of the District Court opinion were copied almost verbatim from the reply brief of the Panama Canal Company. Rule 28 of the Federal Rules of Appellate Procedure does not allow the filing of a brief in response to the appellant reply brief.

More specifically the Circuit Court stated:

> "The evidence was undisputed that George Baus, an attorney for George Engine Company, provided the parties with a form charter party agreement used by George Engine Company for 25 years." *Clem Perrin Marine Towing Company, Inc. v. Panama Canal Company*, 730 F.2d at 190

This sentence was copied almost word for word from the reply brief which states:

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[8]Wright & Miller, *Federal Practice & Procedure* (1971), Sec. 2585, p. 729.

[9]*Ibid.* at p. 731.

"The evidence is undisputed that George Baus, an attorney for George Engine Company, provided a copy of the form which was used to write the bareboat-charter portion of the contract. That company had been using the form for 25 years."

There was no testimony that George Baus provided either party with a copy of the bareboat charter agreement. While there was testimony that Baus had given a copy of the agreement to Herb Lopez, the evidence is clear that Mr. Capitelli, Chief of Procurement for the New Orleans Office of the Canal Company, requested and received a charter party form from Lopez.

". . . He looked for a form contract for bareboat charter but was unable to find one until he asked Mr. H. Lopez."[10]

As with most forms, this blank charter party contained provisions for any eventuality. Mr. Lopez described the form and how it was used by George Engine Company as follows:

"The form contains everything. But in many instances we never gave the option to purchase. I just gave him the form with everything on it, you know. Whether he used it, I don't know."[11]

On March 15, 1974, Clem Perrin, Jr., Marie Perrin, Herb Lopez, Alex Judice and Mr. Capitelli attended a meeting in Mr. Capitelli's office. This was the first time Mr. and Mrs. Perrin had either met or spoken with Mr. Capitelli.

". . . On or about March 15, 1974, while the parties were preparing to sign the contract, Mr. Capitelli

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[10]Ex. P-10-A.

[11]Tr. pp. 935-936.

> talked by telephone with personnel in the Canal Zone about the wording of the contract. He states that he discussed the form contract with someone from the General Counsel's office and that several changes were made on the basis of this conversation. It cannot be determined with certainty with whom in the General Counsel's office Mr. Capitelli talked."[12]

This process took "a couple of hours."[13] Judice was not present when this process took place.[14] Mr. Lopez did not request that any provisions be included[15] and testified that there were no alterations to the form other than those made by PCC.[16] Mr. and Mrs. Perrin concurred that PCC made all the changes to the charter party.[17]

The form charter party was 8¼ pages long containing 2692 words. PCC deleted 472 words (17.5%) and added another 207 words (9% after deletions). PCC also filled in the blank spaces on the form. Article VIII was altered to provide that the owner, and not the charterer, provide insurance. More than half of Article IV was deleted so that the charterer would not assume any risk of loss not covered by insurance. Article VIII was further altered to provide that owner, and not the charterer would bear all losses falling within the insurance deductibles.

Notwithstanding the intent of the parties for a charter party, the Panama Canal Company put in an option to purchase.

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[12]Tr. pp. 935, 936.

[13]Tr. p. 807.

[14]Tr. p. 935.

[15]Tr. p. 937.

[16]Tr. pp. 19, 22, 509, 510.

[17]Tr. p. 938.

The final contract was simply presented for signature without negotiation. It was not read by the Perrins nor Mr. Judice but was signed by Mrs. Perrin.[18]

On the basis of these facts, the charter party should be considered as having been drafted by the Canal Company. Accordingly, all ambiguities should be construed against the drafter. The District Judge also reviewed the form charter party as well as the completed one. The Canal Company deleted 472 words from the form charter and added another 207 words. In hearing this testimony the judge evaluated the credibility of the witnesses. The Canal Company did not produce any witnesses to testify on this subject.

The District Court concluded:

"... However, plaintiff had already tendered its vessel to the defendant. Defendant had had the vessel in its possession and no evidence has been introduced in this case to indicate that plaintiff intended to prevent the defendant from the use of the CLEM PERRIN for the remainder of the charter party period."[19]

The Circuit Court concluded:

"... Here PCC had not already received the return for the performance it suspended; the payment was to be made at the beginning of the last six-month lease-period and title to the vessel had not yet been transferred ..."

Wright and Miller, clearly state:

"The appellate court, in reviewing findings, does not consider and weigh the evidence de novo. The

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[18]Tr. p. 938.

[19]Tr. July 16, 1982, p. 37, 38.

mere fact that on the same evidence the appellate court might have reached a different result does not justify it in setting the findings aside. It may regard a finding as clearly erroneous only if the finding is without adequate evidentiary support or induced by an erroneous view of the law . . . "[20]

III.

The Circuit Court Misapplied The Uniform Commercial Code.

The Canal Company received the vessel's documents in March of 1974. These showed two first preferred ship mortgages which totaled over $350,000. The Canal Company knew that creditors of Clem Perrin were being paid out of charter funds because all but one of the checks listed George Engine Company as an additional payee. In July of 1976, Mr. Lopez told the Canal Company that George Engine Company wanted to be listed as an additional payee on the next check issued by the Canal Company for payment of charter hire. Without any investigation, the Canal Company incorrectly assumed that Perrin was in default on the mortgage. Had they asked, Mr. Lopez could have informed them:

1) that Lopez had relied on the personal credit of the Perrins;

2) that Clem Perrin and her owners always paid their debts; and

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[20]Wright & Miller, *Federal Practice and Procedure*, Sec. 2585, pp. 732-734; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 1969, 89 S.Ct. 1562, 1576, 395 U.S. 100, 123, 23 L.Ed.2d 129; *U.S. v. E.I. Du Pont de Nemours & Co.*, 1956, 76 S.Ct. 994, 999, 351 U.S. 377, 381, 100 L.Ed. 1264; *Bianchini v. Humble Pipe Line Co.*, C.A. 5th, 1973, 480 F.2d 251.

3) that a special arrangement had been made whereby George Engine Company would advance funds to the mortgagee pending receipt of charter hire and would continue to do so.[21]

Instead, the Panama Canal Company waited a month and a half and then wrote a letter to Perrin accusing him of being in default on a mortgage, (which was never proved) and giving Perrin 12 working days to give assurances. Copies of that letter were sent to every major creditor of Perrin including:

1) Alex P. Judice

2) George Engine Co.

3) Bank of New Orleans & Trust Co.

4) Board of Commissioners of the Port of New Orleans

5) American Marine and Equipment Co., Inc.

6) General Electric Credit Corp.

The principals of Perrin were completely confused. Mrs. Perrin did not know what to do about the situation.[22] Mr. Perrin incorrectly interpreted the letter and thought that he had to pay off all of his mortgages by September 15, 1976. It is inconceivable that anyone would expect a small family corporation to do anything but panic when asked for assurances in a threatening letter sent to all of its major creditors from whom it must get help to give those

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[21]Tr. pp. 916, 923, 941, 943, 946.

[22]Tr. p. 309.

assurances within a very short period of time. Further, the Canal Company had no right to dictate what form the assurances should take under U.C.C. Section 2-609.

> "He has no right, however, to indicate what form the assurances shall take." Hawkland, *U.C.C. Series,* Vol. III, p. 111.

Mr. Judice, a creditor himself, contacted the other creditors and found out that the Perrins were not in default on the mortgages as claimed. He then called Mr. Capitelli and told him this. Judice's testimony at the trial was:

> "the creditors I was familiar with did not have Mr. Perrin in default.
>
> He told Mr. Capitelli this and also told him 'he must have gotten some bum information.' "[23]

The Panama Canal Company spent over two months of accountant's time reviewing the records of Perrin and attempted to put on evidence that the company was insolvent. The Court found that "that the evidence in this case does not show any insolvency in the part of the plaintiff corporation or those who were running the corporation." The Court further found that: ". . . there has been no evidence in this case to show that had the Panama Canal Company paid the last installment of the charter hire then sought to exercise its option in December of 1976, that the plaintiff could not have turned over clear and merchantable title."[24]

While the Circuit Court makes no distinction as to whether this is admiralty or federal common law it quite

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[23]Tr. pp. 836, 837.

[24]Tr. July 12, 1982 pp. 39, 40.

clearly treats this matter as a conditional sale. In order to be within the scope of the U.C.C. the charter party in question must be a "secured transaction". 68 Am.Jur.2d, Secured Transaction 6, p. 811. In order to have a conditional sale, it is necessary to ascertain

" . . . the real intent of the contracting parties. . ."

8 Am.Jur.2, Bailments, Sec. 39, p. 775

Clearly, the intent of the parties insofar as the plaintiffs were concerned was that only a lease was intended. The only evidence presented by the Canal Company was that it needed two years to prove out the vessel. No evidence was presented that the Board of that corporation ever intended to buy the vessel. No evidence was presented to show that funds were ever budgeted for that purpose. No evidence was produced that its books reflected that it carried the vessel as an asset and no evidence was produced that on any other occasion it ever bought anything on an installment basis.

CONCLUSION

The Fifth Circuit Court of Appeals erred in not applying admiralty law. The Court also failed to consider all of the evidence when determining that the District Court was "clearly erroneous" and, in any event, misapplied the Uniform Commercial Code.

Respectfully submitted,

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AND
HANEMANN AND ASSOCIATES

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3723

CLEM PERRIN MARINE TOWING, INC.,
Plaintiff-Appellee,

versus

PANAMA CANAL COMPANY, a corporate agency and instrumental of the United States, *in personam*, and its successor agency, the Panama Canal Commission, *in personam*,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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(APRIL 2, 1984)

Before REAVLEY, RANDALL and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Defendant Panama Canal Company appeals from an adverse judgment for breach of a lease-purchase of a tugboat. The district court ordered PCC to return the tug, pay the last installment due on the lease, pay a sum equal to $300 a day for every day from the end of the lease-period until delivery of the tug, and legal interest on the money damages from the day PCC withheld the final lease installment. We reverse, holding that the dispute is governed by U.C.C. principles which authorize withholding

performance in connection with a reasonable request for assurance absent a contrary agreement of the contracting parties. We hold that PCC's action was justified under this standard, and order judgment for PCC on its counterclaim for damages incurred in buying the mortgages on the tug.

I

Effective March 15, 1974, PCC and CPMT agreed to a "Bareboat Charter Party," providing for a three-year bareboat charter of a tug at a cost of $344,880. The agreement called for payments in seven installments, the last five of which were to be paid in advance in consecutive six-month periods. Article XIX of the agreement gave PCC an "option" to purchase the tug during the final ninety days of the three-year period for $26,400, well below CPMT's claimed market value of $190,000. CPMT agreed to provide merchantable title upon exercise of the option. Article XVIII gave either party the right to terminate the contract at any time during the first two years. PCC claims that the contract made at the time of the signing of the "Bareboat Charter Party" also included a purchase order incorporating by reference U.S. government Standard Form 32.

During August, 1976, PCC received information that CPMT was not making its payments on the tug's first mortgage. It also claims it learned for the first time during August that CPMT had encumbered the tug with a third mortgage in addition to the two mortgages outstanding against the tug when the contract was signed. The

final installment of $49,480 was due on September 15, 1976, to cover the six-month period from that date until March 15, 1977. On August 27, 1976, PCC wrote to CPMT that "[i]t has come to our attention that one of the outstanding mortgages on this boat has fallen into default and the Panama Canal company therefore considers that reasonable grounds exist for requiring assurance that clear title to the boat will be perfected on or before December 15, 1976," the date the option to purchase became exercisable. Further, PCC stated that it would not forward the payment due September 15 until it received assurance.

CPMT's only response was to file this suit two days after PCC withheld payment. On December 20, after the purchase option matured, PCC tendered the final charter-hire installment along with the option payment. Delivery was made subject to the condition that CPMT furnish merchantable title. CPMT did not reply.

On April 13, 1977, the companies holding the first and second mortgages on the tug gave notice to PCC that they planned to foreclose and seize the vessel. On June 2, 1977, PCC bought those mortgages for $111,897. In its countersuit against individual third-party defendants Clem and Marie Perrin as well as CPMT, PCC contends that CPMT breached its agreement to provide merchantable title and seeks damages plus interest, in addition to its request for title to the tug.

After discovery and after the denial of several motions for summary judgment filed by both parties, trial in the case was set for May 8, 1978. On March 28, 1978, however, Clem and Marie Perrin filed Chapter XI bank-

ruptcy petitions, and this case was stayed. On January 9, 1979, CPMT was declared bankrupt. The trustee in bankruptcy obtained an order allowing further prosecution of this suit on October 17, 1979, and PCC says it became aware the stay had been lifted when the trustee commenced new discovery proceedings on March 16, 1981.

II

PCC argues that CPMT's failure to exhaust its administrative remedies before suit deprived the district court of jurisdiction. It argues that federal Standard Form 32 is part of the contract, and that under Form 32's "disputes clause" CPMT was required to exhaust administrative remedies before bringing suit. We agree that federal Standard Form 32 is part of this contract. Even if CPMT is correct in claiming that it was never made aware of the purchase order mentioning Form 32, under the doctrine of *G.L. Christian & Associates v. United States*, 312 F.2d 418, 160 Ct. Cl. 1, *reh'g denied*, 320 F.2d 345, 160 Ct.Cl. 58, *cert. denied*, 375 U.S. 954, 84 S.Ct. 444, 11 L.Ed.2d 314 (1963) Form 32 was nevertheless part of the contract by operation of law because it was required by valid regulation. CPMT claims the incorporation of Form 32 was not required by regulation because this was a negotiated contract. However, 41 C.F.R. 1-16.202-1 requires that the forms used in advertised supply contracts also be used in negotiated supply contracts "unless it is determined in accordance with agency procedures that [the forms] are not appropriate for such use. . . . " There is no evidence that the agency determined that use of Form 32 was inappropriate. Indeed, the evidence points in the opposite direction, for PCC referred to Form 32 in the purchase order.

[1] While under normal circumstances the courts would not hear CPMT's claim before its administrative exhaustion if covered by the "disputes clause" of Form 32, *see Crown Coat Front Co. v. United States*, 386 U.S. 503, 511, 87 S.Ct. 1177, 1182, 18 L.Ed.2d 256 (1967), the requirement of administrative exhaustion can be waived. *Id.* at 511 n. 8, 87 S.Ct. at 1182 n. 8; *Nager Electric Company v. United States*, 396 F.2d 977, 184 Ct.Cl. 390 (1968). *But see Atlantic Carriers v. United States*, 131 F.Supp. 1, 5 (S.D. N.Y.1955). We agree with the district court that PCC waived its right to require CPMT to exhaust administrative remedies because of PCC's delay in asserting this point. *See WRB Corp. v. United States*, 177 Ct.Cl. 909 (1966). PCC did not raise the issue of administrative exhaustion until twenty days before trial, almost six years after suit was originally filed. PCC had filed an answer, a counterclaim, and moved for summary judgment three times. Extensive discovery had taken place. PCC's contention that the bankruptcy stay excused the delay in raising the exhaustion issue is meritless on its face, explaining at best only part of the delay. We are asked to penalize CPMT for PCC's failure to raise a problem that was easily discoverable from the day CPMT filed suit. We decline to do so.

III

[2, 3] There was much debate in the court below over whether this case falls within admiralty jurisdiction or federal question jurisdiction. Contracts for the sale of vessels are not within admiralty jurisdiction, but charter

parties are. *Richard Bertram & Co. v. Yacht, Wanda*, 447 F.2d 966 (5th Cir.1971); *Jack Neilson, Inc. v. Tug PEGGY*, 428 F.2d 54 (5th Cir.1970), *cert. denied*, 401 U.S. 955, 91 S.Ct. 973, 28 L.Ed.2d 238 (1971); *The ADA*, 250 F. 194 (2d Cir.1918). On the other hand, federal common law governs the construction of government contracts in the usual case, *see United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970); *United States v. Allegheny County*, 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209 (1944); *Clearfield Trust Company v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), and there is federal question jurisdiction over cases arising under federal common law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *Industrial Indemnity, Inc. v. Landrieu*, 615 F.2d 644 (5th Cir.1980). Since the U.C.C. has been regarded as a source both for admiralty and federal common law, however, whether this dispute falls within admiralty or federal question jurisdiction is irrelevant. *See United States v. Hext*, 444 F.2d 804, 809 (5th Cir.1971); *United States v. Conrad Pub. Co.*, 589 F.2d 949 (8th Cir. 1978); *Jones v. One Fifty Foot Gulfstar*, 625 F.2d 44 (5th Cir.1980). Regardless of which ground of jurisdiction the case falls within, the law to be applied is the same.

IV

U.C.C. section 2-609 provides that when reasonable grounds for insecurity arise, a party may in writing demand assurance and, if commercially reasonable, suspend performance for which he has not already received the agreed return. A ground for insecurity need not arise from or be directly related to the contract under which a

party suspends performance. U.C.C. § 2-609, Comment 3. Here PCC had not already received the return for the performance it suspended; the payment was to be made at the beginning of the last six-month lease-period and title to the vessel had not yet been transferred. Under this standard, PCC need only prove it had reasonable doubt that CPMT would provide merchantable title, and need not prove, for example, that CPMT was insolvent, so long as the doubt is otherwise reasonable. *See* U.C.C. § 2-609, Comment 4. If PCC further can carry its related burden of proving that it was commercially reasonable to suspend performance in light of that doubt, then its case will be made under the U.C.C. standard. Before we turn to this question, however, we must first examine the contract to determine whether it contained any particular agreement regarding suspension of performance because of insecurity.

V

[4] Certain U.C.C. rights and remedies may be contracted away. U.C.C. § 1-102(3). CPMT claims that Article III of the contract does not allow for any right to suspend performance in asking for assurance. That clause reads:

> Payment of Charter Hire shall not be foregone or suspended by reason of the happening of any event whatsover except a total loss of the Vessel, actual or constructive, as constructive total loss will be defined in the policies of insurance. In the event of such total loss of the Vessel all Charter Hire, due in accordance with the payment schedule set forth in this article as of the date of the loss, shall become due and payable, anything to the contrary notwithstanding herein.

PCC argues, however, that this clause must be interpreted in light of Article VII, which provides that in the event of a less than total loss of the vessel insurance proceeds will go to the repair of the vessel. PCC says Article III must be read as being triggered only in the event of damage to or loss of the tug, and meaning that in such a case suspension of performance would not be allowed if the tug was only partially damaged since insurance proceeds would be devoted to the repair of the vessel.

The district court made no finding on the meaning of Article III. Regardless, "[t]he generally accepted rule is that the interpretation of a contract is a question of law, not fact, and appellate review is not limited to the 'clearly erroneous' rule." *Thornton v. Bean Contracting Co., Inc.*, 592 F.2d 1287 (5th Cir.1979). The district court did find that the agreement was "prepared and drafted by the defendant," and that Article X of the agreement allowed CPMT to terminate the agreement upon default in the payment of charter hire. Article X has no relevance, however, unless PCC's actions constituted a "default" in the payment of charter hire; since we hold PCC's actions to be justified, Article X is inapplicable. Furthermore, we need not apply the general rule that ambiguities in a contract are to be construed against the drafter against PCC's construction of Article III, because the district court's finding that PCC drafted the contract is clearly erroneous. The evidence was undisputed that George Baus, an attorney for the George Engine Company, provided the parties with a form charter party agreement, used by the George Engine Company for twenty-five years. This form agreement was used as a draft of the agreement. Although PCC

did delete portions of the agreement before signing and CPMT did not, under the circumstances of this case it cannot be said that PCC drafted the agreement such that ambiguities ought to be read against PCC. Although the question is a close one, we believe PCC's construction to be the more reasonable and therefore hold that Article III did not proscribe PCC's withholding of performance.

[5] PCC argues that it was entitled to withhold performance under either Paragraph 5(b) of Form 32, allowing the government to require the correction of supplies, or Paragraph 11(a)(ii) of Form 32, part of the "default clause."[1] We do not agree that the default clause authorizes suspension of performance in connection with a demand for assurance. PCC admits that the default clause by its terms relates only to the termination of a contract, but argues that by implication it authorizes the less drastic measure of suspension of performance upon insecurity.[2] We think the default clause relates only to contract terminations. Paragraph 5(b), on the other hand, authorizes

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1 CPMT argues that PCC raised these contentions for the first time on appeal. Our examination of the record revealed that PCC had raised these issues below.

2 Paragraph 11(a)(ii) reads:

(a) The Government may . . . terminate the whole or any part of this contract . . .:

(ii) If the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure.

at least PCC's demand for assurance, since this demand was essentially a demand for "conformity" of the vessel to the contract.[3] *See Appeal of Productions Unlimited, Inc.*, VACAB-541 (1966). The clause does not appear to be directly relevant to suspensions of performance, however, and for our purposes it is not important to definitively interprete its scope; to the extent Paragraph 5(b) does not go beyond contemplation of simply asking for conformity it is supplemented by the U.C.C. provisions on suspension of performance applicable by federal common law. *Id.* Therefore we turn to an analysis of PCC's actions under U.C.C. principles.

VI

[6, 7] CPMT claims it was not reasonable for PCC to ask for assurance because CPMT was actually in good financial shape at the time PCC suspended performance and could have provided merchantable title, and further that PCC did not adequately investigate CPMT's financial situation before asking for assurance. The district court made no distinct finding on the reasonableness of PCC's suspension of performance, but did hold that PCC had failed to use "due diligence" in investigating CPMT's financial situation. Whether a buyer has reasonable grounds for insecurity is a question of fact. *See AMF, Inc.*

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[3] Paragraph 5(b) reads in relevant part:

> (b) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction . . . .

v. McDonald's Corp., 536 F.2d 1167 (7th Cir. 1976); *Cherwell-Ralli, Inc. v. Rytman Grain Co., Inc.*, 433 A.2d 984, 180 Conn. 714 (1980); *Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.*, 244 S.E.2d 877, 145 Ga.App. 768 (1978). To the extent CPMT is correct in saying this finding of a lack of "due diligence" may be interpreted to be a finding that PCC was not reasonable in its suspension of performance and request for assurance, we hold that the finding was clearly erroneous.

What prompted PCC's concern was a phone call from Mr. H.J. Lopez of the George Engine Company to the PCC informing PCC that CPMT was not making its mortgage payments on the vessel and that George Engine Company was making them instead. CPMT argues that PCC should have inquired more deeply to determine the extent of any financial difficulty, because in reality CPMT was in no danger of defaulting on its mortgages. CPMT further argues it was unreasonable to suspend performance because PCC was aware that CPMT was relying on the payment to pay off the mortgages. CPMT's argument about the extent of PCC's inquiry misses the point, however. If CPMT was in the fine financial shape it argues it was in, all CPMT had to do in response to PCC's request for assurance was to explain the situation. It was certainly not unreasonable for PCC to become alarmed at Lopez' call, enough so for the call in itself to constitute a reasonable ground for insecurity. Lopez had played a major role in brokering the deal between PCC and CPMT and could reasonably have been considered to have good information about CPMT's financial status. *Cf.* U.C.C. § 2-609, Comment 3 ("[A] report from an apparently trustworthy source that the seller

had shipped defective goods . . . would normally give the buyer reasonable grounds for insecurity."). The standard is one of reasonable insecurity, not absolute certainty. *See* U.C.C. § 2-609, Comment 4, *citing Corn Products Refining Co. v. Fasola*, 94 N.J.L. 181, 109 A. 505 (1920). Here PCC's suspicion was reasonable, as was their action in asking for assurance. Further, in the face of CPMT's silence after the demand for assurance, it was obviously reasonable for PCC to protect itself by withholding payment, notwithstanding that it was aware that doing so would probably hurt CPMT. That suspending performance might hurt CPMT was not reasonably PCC's concern.

VII

We therefore reverse the district court's finding that PCC breached the contract. Instead, we hold that CPMT breached its agreement to provide merchantable title and is liable for the damages PCC incurred in buying the mortgages on the vessel. Of course, CPMT is still owed the last payment of charter hire and the option payment. We therefore remand the case to the district court for the purpose of offsetting the amounts owed and then awarding PCC the remaining amount. The district court is further directed to award PCC prejudgment interest, *see Com. Standard Ins. Co. v. Bryce St. Apts., Ltd.*, 703 F.2d 904 (5th Cir.1983), and to enter an order for specific performance compelling CPMT to deliver clear title to the vessel to PCC. Finally, since the parties did not brief the issue on appeal of whether the third-party defendants may be reached by piercing the corporate veil, we remand that issue to the district court for its consideration.

REVERSED and REMANDED.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 76-2861
SECTION "L"

CLEM PERRIN MARINE TOWING, INC.

VERSUS

PANAMA CANAL COMPANY,

A corporation agency and instrumental of the United States, *in personam*

Transcript of proceedings held in the above-entitled matter on Friday, July 16, 1982, in the Courtroom, Section "L", 500 Camp Street, New Orleans, Louisiana 70130, the Honorable Veronica D. Wicker, District Judge, presiding.

(p. 32) THE COURT:

I am going to dictate my findings into the record.

I am not going to go into all of the evidence, but if anyone wishes to appeal my decision, if they will let me know within a short period of time, formal findings will be entered, but until that time I think that there is sufficient information that I will give out at this time.

Well, this action was brought by the corporate plaintiff, Clem Perrin (p. 33) Marine Towing, for a breach of the bareboat charter party on the grounds that defendant has failed to pay the hire.

The evidence reflects that in March of 1974, the plaintiff and the defendant, Panama Canal Company, entered into an agreement whereby the defendant leased the vessel the CLEM PERRIN for a period of three years.

The agreement also provided that the charterer had the option to purchase the vessel at any time after December 14, 1976, and before March 16, 1977, by the single payment to the owner of $26,400.

Hire was set at $344,880.78 payable in seven installments. The last installment due and owing on September 15, 1976.

The contract provided that "If the charterer defaulted in the prompt payment of charter hire the owner had the right to terminate the charter party."

The vessel was inspected by the defendant in New Orleans and transported to the Panama Canal where it operated as a (p. 34) dredge tender. Hire was promptly paid and no problems arose until August of 1977, when defendant was advised by Herbert J. Lopez that George Engine had not received a check from Clem Perrin and it was making payments on the mortgage.

Defendant without using due diligence to determine the financial status of the plaintiff then wrote to the corporation stating that it wished to exercise its option under the agreement, but withhold the last installment due on the hire until it was assured that the plaintiff could deliver clear title.

Plaintiff did not respond to the letter. The defendant withheld the hire and suit was filed by plaintiff on September 17, 1976, two days after payment of hire was

due. In December, defendant tendered the hire and the purchase price was refused by the plaintiff corporation.

I find that the plaintiff had a right to terminate the charter party for failure of the defendant to pay the last installment of the charter hire due on (p. 35) September 15, 1976.

The evidence reflects that the charter agreement was prepared and drafted by the defendant.

Article X of that contract specifically regards "That should that charterer default in the prompt payment of charter hire, the owner at his option may declare the charter party terminated and of no force and effect."

There is nothing in the agreement which provides that the charterer may withhold hire.

Now the Panama Canal Company has contended throughout these proceedings that the agreement was for all intents and purposes a sale, that admiralty law does not apply to this case, and, accordingly, this Court must apply Federal Common Law which defendant interprets to be the Uniform Commercial Code that the Panama Canal Company had the right to withhold charter hire until plaintiff assured it that should defendant decide to exercise its option it could provide clear title.

(p. 36) I conclude that although the charter agreement contained an option to purchase clause, the contract as a whole cannot be fairly characterized as a contract of sale or a lease purchase agreement.

Courts have indicated that if the option to purchase was exercised the agreement may be considered the sale.

Here, in this case, defendant could not have exercised the option before December of 1976.

Also the defendant has failed to show that at the time the agreement was entered into, in March of '74, the parties intended to sell the vessel on the installment plan. On the contrary, the agreement specifically provided that either party could terminate, at the end of the first and the second year, this contract. Moreover, the defendant has failed to prove any fraud on the part of plaintiff in the making of the contract. Therefore, I am of the opinion that Admiralty Law applies.

However, assuming, arguendo, that this agreement could be characterized as a sale, I see no reason and no one has ever (p. 37) mentioned this, why the Uniform Code rather than Louisiana Law should apply. The contract was negotiated and signed in Louisiana. Plaintiff was a Louisiana corporation, all negotiations were contained here. Counsel have cited no law which states that in a Federal Court sitting in Louisiana the Court must apply the Uniform Commercial Code, because it is the Federal common law.

However, even assuming that this is the law, that is, the Uniform Commercial Code, the Uniform Commercial Code provides "That if a party has reasonable grounds to believe that the other party to a contract of sale will be unable to perform, that party may, in writing, demand an adequate assurance of due performance and until such is received, he may suspend any performance for which he has not already received the agreed return."

In August of 1976, all that existed was a charter party. The right to exercise the option did not.

Defendant in this case has suspended its performance in not paying the charter hire. However, plaintiff had already (p. 38) tendered its vessel to the defendant. Defendant had had the vessel in its possession and no evidence has been introduced in this case to indicate that plaintiff intended to prevent the defendant from the use of the CLEM PERRIN for the remainder of the charter party period. Accordingly, I find that this clause is inapplicable to the facts of this case.

Finally, defendant has argued that certain provisions contained in Standard United States Form 32 should be read into the contract and applied in this case. I have reviewed Standard Form 32 and this argument is spurious. The Court feels it should not dignify these allegations. However, for appellate purposes, I conclude that those paragraphs contained in 32 are inapplicable here.

This form does appear to apply to lease agreements. Moreover, Federal Regulations 41 Code of Federal Regulations Section 1-7.102 states that the Form shall be used in fixed-price supply contracts. The instant contract is a bareboat charter (p. 39) and defendant has cited no regulation nor any case construing supply contracts to include such charter agreements.

Let me just make one more comment that was brought up about the restatement of contracts, and I will cite some of that here.

It says for performance in an agreed exchange a promissor need not perform at the time fixed for per-

formances of his promise if performance of the exchange is uncertain because the other party is insolvent. On the contrary I find that the evidence in this case does not show any insolvency on the part of the plaintiff corporations or those who were running the corporation.

The evidence is that Mr. Lopez testified that Mr. Perrin and his sister individually were worth over $300,000, that also in the past Mr. Perrin or Clem Perrin Towing Company had also been able to pay its debts.

There is one other thing that I failed to mention and that was the fact that there has been no evidence in this case to show that had the Panama Canal Company paid (p. 40) the last installment of the charter hire and then sought to exercise its option in December of '76, that the plaintiff could not have turned over clear and merchantable title.

Accordingly, this Court finds that there is insufficient evidence to conclude that plaintiff in this case was insolvent.

Accordingly, under the terms of the charter party, this Court finds that plaintiff is entitled to recover from defendant the last charter hire installment which was due in September of 1976.

Plaintiff is also entitled to return of the vessel which has been in the possession of defendant since March of 1974.

Under the terms of the charter party the defendant is liable for expenses for the transport of the vessel from New Orleans.

Finally, the plaintiff seeks for the period of March 15, '77, until the return of the vessel charter hire.

Now, we have had various testimony, none of it particularly conclusive.

(p. 41) We have had Mr. Judice testify that reasonable charter hire would be approximately $300 a day. Mr. Faulkner testified that in 1977, a $185 would be reasonable and in '78 and in '79 $6,000 a month. That hundred and eighty-five was per day, but he said that that was plus insurance.

The evidence in this case reflects that it was the plaintiff who paid the insurance and no evidence has been introduced to determine what the insurance rate would be.

Accordingly, I find that in accordance with the terms of the charter party calling for a demurrage rate of $300 a day, that this would be reasonable. Additionally, Mr. Judice also testified that this was a reasonable amount for demurrage. He also testified that in his opinion the three hundred or whatever the charter hire was, which I think amounts to a little more than $300 a day, that this was approximately 25 percent of the current charter hire, but I'm going to hold that $300 a day is what the plaintiffs are entitled to recover and that (p. 42) it is not unreasonable.

I am going to ask, Mr. Koch, to prepare a judgment.

MR. KOCH:

Yes, Your Honor.

THE COURT:

And if there is going to be any appeal on that decision, I will ask, perhaps, in the future for you to prepare findings and conclusions based upon the facts and findings as I have read them into the record.

MR. KOCH:

Your Honor, if I might just ask one question. On that $300 a day, what period would that be from?

THE COURT:

Are you speaking of for loss of use?

MR. KOCH:

Yes, Your Honor.

THE COURT:

When did the charter end?

MR. HANEMANN:

March 15, '77.

THE COURT:

(p. 43) So that would go from March 16 of '77, until the vessel was returned.

MR. KOCH:

Thank you, Your Honor.

THE COURT:

Does anybody want to do anything else at this time before I recess?

MR. HANEMANN:

No, Your Honor.

Thank you.

MR. LITTLE:

Thank you, Judge.

THE COURT:

Thank you.

If counsel for the defendants will let me know whether you intend to appeal, I will enter formal findings for appellate purposes.

I have not touched on all the issues and all the evidence, but I would be more expansive, so it is up to you, if you will just let my office know within a reasonable period of time.

MR. McKABNEY:

Your Honor, might I ask one question?

(p. 44) The finding of damages from March, 1977, to date, does not appear to take into account the question of the long delay and the prosecution of the suit.

THE COURT:

I have reviewed that. I am well aware of the fact that there was bankruptcy proceedings pending. However, I believe that it was an obligation of the Panama Canal Company to return that vessel so that it could have been put to use during the pendency of the suit.

As a matter of fact, it was to put to use during the pendency of the suit. The Panama Canal Company put it to use and you were not paying charter hire for that period of time, isn't that correct, Counsel?

(Whereupon, no response from all counsel.)

THE COURT:

Anything else?

MR. KOCH:

No, Your Honor.

THE COURT:

All right. Court stands in (p. 45) recess until ten o'clock Monday morning.

THE CLERK:

Everyone rise, please.

Court stands in recess until ten o'clock Monday morning.

(Whereupon, at 11:30 p.m., Court recessed for the day until ten o'clock Monday morning, July 19, 1982.)

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 76-2861
SECTION "L"

CLEM PERRIN MARINE TOWING, INC.

VERSUS

PANAMA CANAL COMPANY

JUDGMENT

(Filed October 5, 1982)

This action came on for trial before the Court, Honorable Veronica D. Wicker, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Clem Perrin Marine Towing, Inc. recover of the defendant, Panama Canal Commission, the sum of $49,480.13 with interest thereon at the legal rate from September 15, 1976 until paid.

IT IS FURTHER ORDERED that the Panama Canal Commission return the M/V CLEM PERRIN to Clem Perrin Marine Towing, Inc. and pay charter hire at the rate of $300.00 per day from March 16, 1977 until the vessel's return, with interest on charter hire as it accrues at the legal rate until paid.

New Orleans, Louisiana, this 1st day of October, 1982.

VERONICA D. WICKER
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3723

CLEM PERRIN MARINE TOWING, INC.,

Plaintiff-Appellee,

versus

PANAMA CANAL COMPANY, a corporate agency and instrumental of the United States, *in personam,* and its successor agency, the Panama Canal Commission, *in personam.*

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion 4/2/84, 5 Cir., 198—, ——— F.2d ——)

(Filed May 21, 1984)

Before REAVLEY, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

• • •

ENTERED FOR THE COURT:

/s/ PAT E. HIGGINBOTHAM
United States Circuit Judge

Appendix E

"Events of default. The following shall constitute events of default under this Agreement:

(a) The failure of the Charterer to pay the charter hire on each Vessel as and when the same shall be due under the terms of this Agreement.

Termination upon default. The Owner may terminate this Agreement in whole or in part without notice to the Charterer in case any event of default specified in paragraphs (a), (b), (c), (d), (e), or (f) of the preceding Clause. . . ." 46 C.F.R. Sec. 299.82 (1953); 46 C.F.R. Sec. 299.82 (1957); 46 C.F.R. Sec. 221.13 (1974).

"In default of payment of hire as specified, owners shall have the faculty of withdrawing the vessel from the service of the charterers without prejudice to any claim they (the owners) might otherwise have on the charterers under this charter." G. Strech, *Chartering of Ships,* Vol. I, p. 57 (1953).

"5. Payment of said hire to be made in New York in cash in United States Currency, semi-monthly in advance, and for the last half month or part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers." Gilmore & Black, p. 1005 (Time Charter). See also, Wilford, Coughlin and Healey, *Time Charters* (1978) p. 110.

"EVENTS OF DEFAULT AND REMEDIES OF OWNER.

The following shall, without limitation, constitute events of default under this Charter:

(a) Failure of the Charterer to pay charter hire on and when the same shall be due, time being the essence in this respect;" Parks, *The Law of Tug, Tow and Pilotage,* (2d Ed. 1982) p. 1171, 1172 (Bareboat Charter), p. 1188 (Time Charter). See also, Parks, *The Law of Tug, Tow and Pilotage* (1971), p. 558 (Bareboat Charter), p. 574 (Time Charter).